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THE MEANINGLESSNESS OF DELAYED APPOINTMENTS AND DISCRETIONARY GRANTS OF CAPITAL POSTCONVICTION COUNSEL

Celestine Richards McConville*

Indigent capital inmates in Alabama who wish to pursue state postconviction remedies will receive court-appointed counsel only if a court, in its discretion,¹ determines “that counsel is necessary to assert or protect the rights of the petitioner.”² To satisfy this standard, one would think that Alabama courts would make the appointment determination, as well as the appointment, well before the postconviction petition must be filed so that counsel could actually assist the capital inmate with investigating, discovering, and properly raising all known and knowable claims. Indeed, for precisely these reasons, capital inmates seeking federal habeas relief may invoke their mandatory statutory right to counsel before filing their petitions.³ Unfortunately, Alabama does not follow this practice, and instead delays the appointment determination until *after* the capital inmate has filed a capital habeas petition⁴ and survived summary dismissal⁵—two very difficult tasks, to say the least. Even a disinterested observer would appreciate the potential problems posed by Alabama’s system, especially for

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1. Only four death states provide a discretionary statutory right to capital postconviction counsel. Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 64 n. 189 (listing Alabama, Delaware, Kentucky, and Nebraska). Thirty-two death states provide a mandatory statutory right to capital postconviction counsel. *Id.* at 64 n. 188. This figure includes New York, even though the New York Court of Appeals ruled that the statute violated the state constitution because it contained a coercive deadlock instruction. *State v. LaValle*, 3 N.Y.3d 88, 128 (2004). Two death states provide no statutory right to counsel. McConville, *supra*, at 65 n. 190. There is no constitutional right to counsel during state postconviction proceedings. *Murray v. Giarratano*, 492 U.S. 1, 3–4 (1989) (plurality); *Pa. v. Finley*, 481 U.S. 551, 555–56 (1987).

2. Ala. R. Crim. Proc. 32.7(c); *see also* Ala. Code § 15-12-23(a) (Lexis Supp. 2005).

3. *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994) (“An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial, because ‘[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.’” (quoting *Giarratano*, 492 U.S. at 14 (Kennedy & O’Connor, JJ., concurring))).

4. According to the Alabama Supreme Court, “most [postconviction] petitioners file their petitions without the assistance of legal counsel.” *Ex parte Jenkins*, 2005 WL 796809 at *5 (Ala. Apr. 8, 2005).

5. *Id.* (describing the process for appointment of capital postconviction counsel); *see also* Ala. R. Crim. Proc. 32.7(c) (listing absence of summary dismissal as a condition precedent to the discretionary grant of postconviction counsel).

capital inmates seeking to prove their innocence.

In *Barbour v. Haley*,⁶ a group of capital inmates filed a section 1983 class action⁷ in federal district court challenging Alabama's delayed appointment system for postconviction counsel. They argued, among other things, that the system of delayed appointment violated their due process right of meaningful access to the courts.⁸ As petitioners explained:

Alabama postconviction procedure . . . is marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without competent counsel. The Alabama Attorney General's Office routinely files motion to dismiss claims in petitions filed *pro se* by death-row prisoners on procedural grounds. . . . Alabama judges have adopted the Attorney General's interpretation of the pleading requirements of Rule 32, under which petitioners must set out specific factual details that cannot be obtained unaided from Death Row. Lacking the ability to interview witnesses, gather records, or investigate factual questions before filing—let alone the legal skill to understand what form of allegations will make a pleading “sufficiently specific” . . . prisoners are at risk of summary dismissal.⁹

In other words, without counsel to assist them, capital inmates in Alabama face an uphill battle in preparing state postconviction petitions capable of withstanding the government's efforts at summary dismissal. Petitioners also argued that, without state postconviction counsel, petitioners face “the peril of losing federal habeas review”¹⁰ because the one-year statute of limitations applicable to federal petitions is tolled only upon the proper filing of a state postconviction petition.¹¹ So the longer a petitioner waits before filing a state petition, the less time she will have (if any) to investigate, prepare, and file a federal petition.¹²

The federal magistrate judge¹³ rejected the inmates' access claim, emphasizing not

6. 410 F. Supp. 2d 1120 (M.D. Ala. 2006). The inmates were represented by lawyers from the Equal Justice Initiative of Alabama (EJI) and the law firm of Holland & Knight. *Id.* at 1121.

7. *Id.* at 1124–25. The court certified a class of all

[P]ersons (1) who have been, are or will be in state custody, (2) who are under a sentence of death, (3) who are unable to afford counsel and have been, are or will be unrepresented by counsel in connection with the investigation, initiation or prosecution of state postconviction remedies, (4) whose convictions have become final under state law, (5) who have not completed the postconviction, collateral review process provided under the laws of Alabama, and (6) for whom the State refuses to provide counsel for the investigation, initiation and prosecution of state postconviction remedies.

Id. at 1125.

8. *Id.* at 1122–23; *Barbour*, Pl.'s Br. in Opposition to Def.'s Mot. for S.J. & Pl.'s Submission of Additional R. 56(e) Materials 26–37 (Aug. 29, 2003) [hereinafter *Barbour Br.*].

9. *Barbour*, 410 F. Supp. 2d at 1123 (footnote omitted) (quoting *Barbour Br.* 30–31).

10. *Barbour Br.* 6; see *id.* at 5–6, 20, 41.

11. 28 U.S.C. § 2244(d)(2) (2000). A state postconviction petition is “properly filed” when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis omitted). Thus, a late filing in state court will not toll the federal limitations period.

12. *Barbour Br.* 6, 20, 41. In their brief opposing summary judgment, the plaintiffs revealed that “[t]wenty-one death-row prisoners have less than a week remaining before their federal limitations period expires[, and] [t]en of these prisoners have less than two days remaining to get to federal court.” *Id.* at 41 (citation omitted).

13. The parties consented to jurisdiction by the federal magistrate judge, as permitted by federal law and the Federal Rules of Civil Procedure. See *Order, Barbour v. Haley*, Civ. Action No. 01-D-1530-N (M.D. Ala. Apr. 3, 2002).

only the Supreme Court's consistent refusal to interpret the right of access to postconviction courts as including the right to counsel,¹⁴ but also the Court's admonition that the right to meaningful access "guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts."¹⁵ Even without counsel, plaintiffs were able to file petitions and thus "*present*"¹⁶ their claims to the courts, so they were not denied meaningful access. This is true, the court noted, even though "in some instances collateral review of some of their claims has been denied on procedural or limitations grounds."¹⁷

While the magistrate judge's reasoning is not unassailable,¹⁸ the ultimate ruling is arguably correct under existing Supreme Court precedent, which has expressed increasing hostility toward access claims—especially access claims that seek to impose affirmative obligations on the government.¹⁹ To be sure, the plaintiffs employed a well-designed strategy: they focused narrowly on the unique circumstances present in Alabama, arguing that *their situation* necessitated the appointment of counsel before, rather than after, filing the petition so that counsel could assist in the investigation, preparation, and filing of the petition. Such assistance, they argued, was necessary to obtain review of their claims on the merits.²⁰ They were not arguing for the tools necessary to *win* their cases but, rather, for assistance in simply putting the claims before the postconviction court for examination.²¹ As they explained, it was becoming more and more difficult for capital inmates in Alabama to obtain representation.²² Their arguments wisely attempted to exploit a potential weak spot in the precedent—a spot created by Justice Kennedy's concurrence in *Murray v. Giarratano*,²³ which emphasized the complexity of postconviction proceedings and suggested that postconviction counsel might be constitutionally required if inmates are unable to obtain counsel.²⁴ But still, the

14. *Barbour*, 410 F. Supp. 2d at 1133–34.

15. *Id.* at 1133 (quoting *Lewis v. Casey*, 518 U.S. 343, 356 (1996)).

16. *Id.* at 1132 (emphasis added) ("If the right of access is properly understood as a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights which may not be hindered, then the plaintiffs' right of access has not been denied because their claims have been presented." (citation and footnote omitted)).

17. *Id.*

18. The magistrate judge, for example, was surely wrong to reject out of hand the mere *possibility* that dismissals for failure to comply with the limitations period *might* be caused by government conduct and thus constitute a denial of meaningful access. As explained later in the discussion, the Supreme Court has indicated that a dismissal caused by the inadequacy of the government's program can state a claim for denial of access. See *infra* notes 92–93 and accompanying text (discussing *Lewis*).

19. See *Christopher v. Harbury*, 536 U.S. 403, 405–06 (2002) (holding that, in order to state a claim for denial of access, plaintiffs must "identify an underlying cause of action" that has been, or will be, lost as a result of government conduct and show that there is no other remedy available for the loss); *Lewis*, 518 U.S. at 351–55 (rejecting claim that access right required access to law libraries or ability to "discover grievances" or "litigate effectively" (emphasis deleted)); *Giarratano*, 492 U.S. at 10–12 (holding that state is not constitutionally obligated to supply counsel to capital inmates during postconviction proceedings); *Finley*, 481 U.S. at 555–57 (holding that state is not constitutionally obligated to supply counsel during postconviction proceedings).

20. *Barbour* Br. 27–33.

21. *Id.* at 37–42.

22. *Barbour*, 410 F. Supp. 2d at 1131; *Barbour* Br. 33–37, 46–49.

23. 492 U.S. at 14 (Kennedy & O'Connor, JJ., concurring); *Barbour* Br. 15–16.

24. In *Giarratano*, Justice Kennedy concurred in the judgment, providing the fifth vote for the majority.

plaintiffs' argument faced an extreme uphill battle. And given existing precedent, the ruling could not have been a total surprise.

So, one might ask, why even look twice at the decision? The answer is simple: we should look twice because, in a jurisdiction that *voluntarily grants a statutory right to capital postconviction counsel*, the constitutional inquiry should not stop at (or perhaps even focus on) meaningful access. Instead, it should proceed to the more relevant inquiry of the meaningful right to capital postconviction counsel. Alabama has decided to provide capital postconviction counsel as a matter of statutory grace, and, as I have argued elsewhere, this decision triggers a constitutional obligation to ensure that the right to counsel is meaningful.²⁵ Thus, the real question in *Barbour* is not whether plaintiffs were denied meaningful access to state postconviction remedies but, rather, whether Alabama has failed to provide a constitutionally meaningful statutory right to capital postconviction counsel. This question is an extremely important one for as explained in detail below, the meaningful counsel claim calls not only for a different analysis but also for a different conclusion. For the 191 inmates on Alabama's death row²⁶—the seventh largest death-row population among death-penalty states²⁷—a different conclusion could make all the difference in the world.

I have spent several years exploring the scope and substance of what I have called the “meaningfulness requirement”²⁸—a doctrine based in the Due Process Clause of the Constitution and triggered by the government's voluntary grant of rights designed to ensure the reliability of the criminal process.²⁹ My exploration of the meaningfulness requirement has focused particularly on the meaningful right to capital postconviction counsel—a right that comes into being once the government grants capital inmates a statutory right to such counsel.³⁰ A few Supreme Court opinions,³¹ together with the refusal of Congress to make ineffective assistance of postconviction counsel a violation of federal law cognizable on federal habeas,³² piqued my interest in the subject of meaningful grants of counsel and ignited a desire to investigate the theoretical underpinnings of voluntary grants of counsel. Until now, my efforts have centered

492 U.S. at 14 (Kennedy & O'Connor, JJ., concurring). Although he declined to address the question whether counsel is constitutionally required in capital postconviction proceedings, he noted the importance of counsel in assisting capital inmates through the maze of postconviction relief. *Id.* In his view, “meaningful access can be satisfied in various ways,” and, because “no prisoner on death row in Virginia has been unable to obtain counsel . . . in postconviction proceedings, . . . [he could not conclude] that [Virginia's] scheme violates the Constitution.” *Id.* at 14–15. Justice Kennedy's concurrence appears to leave open the possibility that counsel might indeed be required to achieve meaningful access.

25. McConville, *supra* n. 1, at 67–84.

26. Death Penalty Information Center, *Facts about the Death Penalty* 2, <http://www.deathpenaltyinfo.org/FactSheet.pdf> (Sept. 1, 2006).

27. *Id.*

28. See Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521 (2005); McConville, *supra* n. 1.

29. McConville, *supra* n. 1, at 69.

30. *E.g. id.* at 80–84.

31. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Giarratano*, 492 U.S. 1; *Finley*, 481 U.S. 551; *Wainwright v. Torna*, 455 U.S. 586 (1982).

32. Federal law prohibits federal habeas petitioners from challenging the effectiveness of statutorily granted counsel in federal habeas proceedings. 28 U.S.C. §§ 2254(i), 2261(e) (2000).

largely on two things: proving that the government's decision to provide capital postconviction counsel creates a concomitant constitutional obligation to provide effective assistance of counsel, and defining effectiveness as requiring not only rigorous competency standards but also thorough monitoring of counsel's performance during the actual capital postconviction process.³³ With the *Barbour* case comes the opportunity to continue fleshing out the concept of meaningful capital postconviction counsel, exploring how discretionary and delayed grants of counsel fare under the glare of the meaningfulness requirement.³⁴

Part I of this article explores the relationship between two strands of the meaningfulness requirement—the right to meaningful access to postconviction remedies and the right to meaningful postconviction counsel—and explains why these two strands provide differing levels of protection for the capital inmate and why the meaningful counsel strand is a better vehicle for challenging Alabama's system of appointing capital postconviction counsel. As explained in that part, the Supreme Court has made clear that the meaningful access strand, at least in the postconviction context, was intended to be very narrow, ensuring virtually nothing more than a reasonable opportunity to bring relevant claims before the proper postconviction tribunal. The meaningful capital postconviction counsel strand, on the other hand, is somewhat broader, focusing on the quality of counsel's performance and, hence, the quality and content of the petition filed on behalf of the capital inmate.

Part II evaluates the meaningfulness of Alabama's right to counsel, focusing particularly on the impact of both delayed *and* discretionary appointments of counsel. As that part explains, delaying appointment until after the petition has been filed effectively deprives counsel of any meaningful opportunity to represent her client. Discretionary appointments are similarly problematic because there is too great a risk that the postconviction court will be unable to accurately ascertain the need for an attorney on a case-by-case basis. Accordingly, Part II concludes that Alabama's system fails to adequately protect the rights of capital inmates and thus does not provide a meaningful right to capital postconviction counsel.

The problems with Alabama's postconviction counsel system have very real, and very dramatic, consequences. Without meaningful assistance of counsel during the postconviction process, the risk of executing an innocent person rises dramatically.³⁵ The risk becomes even greater in light of the tremendous growth of Alabama's death row population: the number of inmates on Alabama's death row has doubled over the last

33. McConville, *supra* n. 28, at 543–98 (explaining scope and structure of monitoring requirement); McConville, *supra* n. 1, at 80–110 (discussing right to effective assistance and necessity of competency standards and monitoring).

34. The arguments developed in this article could apply to delayed and discretionary grants of postconviction counsel in both capital and non-capital cases. Issues of innocence exist in both types of cases, and navigating the postconviction process is difficult for *all* petitioners, regardless of the punishment imposed. Nevertheless, because of the unique and irrevocable nature of the punishment, this article focuses solely on the constitutional implications of delayed and discretionary grants of capital postconviction counsel.

35. See *Barbour* Br. 32–33 (explaining that “[d]eath row prisoners who have succeeded in challenging their convictions and death sentences have all been assisted by counsel who spent hundreds of hours pursuing claims and avenues of relief that uncovered illegally obtained convictions and death sentences”); *id.* at 48 (describing critical role of volunteer counsel in protecting rights).

decade, and, “[i]n the past few years, Alabama sentenced more people to death per capita than any other state in the country.”³⁶ The *Barbour* plaintiffs made great progress in terms of publicizing the problems with Alabama’s system of appointment. The American Bar Association (ABA) also helped in this endeavor with its recent recommendation for a moratorium on executions in Alabama,³⁷ which was based in part on the inadequacy of Alabama’s system of postconviction counsel.³⁸ Now is the time for Alabama to listen to the chorus of voices clamoring for meaningful change.

I. THE MEANINGFULNESS REQUIREMENT IN THE POSTCONVICTION CONTEXT

A close examination of the Supreme Court’s due process decisions reveals the existence of what I have called the “meaningfulness requirement”—a requirement that is triggered when the government voluntarily grants a right that “is designed to protect either the fairness and reliability of the criminal trial or the individual rights of criminal defendants.”³⁹ A meaningful right is not a “futile gesture”⁴⁰ but rather is “adequate and effective”⁴¹ and “designed to achieve its purpose.”⁴² The meaningfulness requirement surfaced as early as 1941,⁴³ and it has since been applied in the context of direct review,⁴⁴ discretionary review,⁴⁵ postconviction proceedings,⁴⁶ and civil rights actions.⁴⁷

36. Equal Justice Initiative of Alabama, *Representation of Death Row Prisoners*, <http://www.eji.org/representation.html> (accessed Sept. 13, 2006); see also *Barbour* Br. 12 (“[A]s the death-row population continues to balloon, substantial numbers of inmates will inevitably be executed who have been unable to obtain any real judicial consideration of potentially meritorious constitutional challenges to their executions.”).

37. Death Penalty Information Center, *ABA Assessment Report Calls for Alabama Death Penalty Moratorium*, <http://www.deathpenaltyinfo.org/newsanddev.php?scid=68> (accessed Sept. 13, 2006).

38. ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 111 (2006) (recommending that counsel be appointed “at every stage of the legal proceedings” and that “[c]ounsel should be appointed as quickly as possible prior to any proceedings”).

39. *McConville*, *supra* n. 1, at 69.

40. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985); see *Douglas v. Cal.*, 372 U.S. 353, 358 (1963).

41. *Evitts*, 469 U.S. at 393 (quoting *Griffin v. Ill.*, 351 U.S. 12, 20 (1956) (internal quotation marks omitted)).

42. *McConville*, *supra* n. 1, at 69.

43. See *Ex parte Hull*, 312 U.S. 546, 549 (1941) (invalidating state prison regulation that interfered with “petitioner’s right to apply to a federal court for a writ of habeas corpus”).

44. *Douglas*, 372 U.S. at 356–58 (state must provide counsel to indigent defendants on appeal as of right); *Griffin*, 351 U.S. at 18–20 (state must provide free transcript to indigent defendants on appeal as of right or “find other means of affording adequate and effective appellate review to indigent defendants”).

45. *Ross v. Moffitt*, 417 U.S. 600, 611–16 (1974) (counsel not required for discretionary appeals on direct review).

46. *E.g. Finley*, 481 U.S. at 558–59 (state postconviction context); *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (postconviction and civil rights contexts); *Wolff v. McDonnell*, 418 U.S. 539, 579–80 (1974) (same); *Johnson v. Avery*, 393 U.S. 483, 485–87 (1969) (federal habeas context). States are not required to provide postconviction review, *Finley*, 481 U.S. at 557, so the meaningfulness requirement naturally applies once the states decide to do so. The relevance of the meaningfulness doctrine to federal habeas relief is not as obvious because the federal habeas remedy arguably is mandatory. See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas for State Prisoners?* 92 Mich. L. Rev. 862, 875 (1993) (arguing that *Ex parte Bollman*, 8 U.S. 75 (1807), interpreted the Constitution to require federal habeas remedy). Nevertheless, the Supreme Court has applied the meaningfulness doctrine in the federal habeas context, see *Johnson*, 393 U.S. at 485–87, and this article proceeds on the assumption that it does so correctly. See *McConville*, *supra* n. 1, at 78–79 n. 267 (discussing implication of applying *Bounds*’ meaningful access requirement in context of federal habeas review).

47. *Bounds*, 430 U.S. at 827 (postconviction and civil rights actions); *Wolff*, 418 U.S. at 579–80 (same), see

The demands of the meaningfulness requirement are not static; they differ depending on the nature of the voluntarily granted right and the context in which that right is asserted. Naturally, then, the procedures required to achieve meaningfulness will not be the same for every right. In general, the more important the right is (in the Court's view) to the reliability of the criminal process, the more rigorous the procedures will have to be to protect that right. The Court views direct appeal as of right as more important to the reliability of the criminal process than discretionary review,⁴⁸ and it views postconviction review as less important than both.⁴⁹ Thus, the meaningfulness requirement is fairly demanding in the direct appeal context and less demanding in the discretionary appeal and postconviction contexts.⁵⁰

In addition to the purpose of the right and its contribution to the reliability of the criminal process, the Court also considers the government's sovereign interests in its criminal justice system. In the postconviction context, the government's sovereignty interests feature prominently, with the Court being careful to weigh the government's interests in retaining control over its criminal justice system against the capital inmate's interest in enjoying the voluntarily granted right.⁵¹ If a procedure is too costly, threatens undue delay in imposition of the sentence, or undermines an important policy choice, then it will not be part of the meaningfulness requirement.⁵² Moreover, while the meaningfulness requirement sometimes dictates a particular procedure the government must follow,⁵³ it does not always do so, and in these circumstances the government has some latitude in selecting procedures designed to ensure a meaningful right.⁵⁴

In the postconviction context, there are two basic strands of the meaningfulness requirement: meaningful access to the courts⁵⁵ (to pursue postconviction remedies) and meaningful capital postconviction counsel. The discussion below examines both strands, explaining why the access strand, as developed and understood by the Supreme Court, is unhelpful, if not inapplicable, when the relief sought relates to the availability and performance of counsel. It then explains why the meaningful capital postconviction counsel strand is a better vehicle for challenging Alabama's system for appointing

also McConville, *supra* n. 1, at 77–78 (discussing contexts in which meaningfulness requirement applied).

48. See *Ross*, 417 U.S. at 615 (explaining that discretionary review is not concerned with “whether there has been a correct adjudication of guilt . . . but rather whether the subject matter of the appeal has significant public interest” (internal quotation marks omitted, citation omitted)); *Griffin*, 351 U.S. at 18 (stating that direct appeal is “an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant”); McConville, *supra* n. 1, at 70–75 (discussing the Supreme Court's decisions in *Griffin*, *Douglas*, *Evitts*, *Ross*, and *Finley*).

49. See *Finley*, 481 U.S. at 556–57 (explaining that postconviction review “is not part of the criminal proceeding itself” and is “even further removed from the criminal trial than is discretionary direct review”); McConville, *supra* n. 1, at 74–75 (discussing the Supreme Court's decisions in *Ross* and *Finley*).

50. McConville, *supra* n. 28, at 531–33; McConville, *supra* n. 1, at 70–80.

51. *Id.* at 70.

52. *Id.* at 75–78 (discussing the Supreme Court's analysis in *Finley* and *Bounds*).

53. E.g. *Douglas*, 372 U.S. at 356–58 (requiring appointment of counsel for indigent inmates pursuing direct appeal as of right).

54. McConville, *supra* n. 1, at 70.

55. The Supreme Court has characterized the source of “the constitutional right of access to courts” as “unsettled,” noting that it has alternately described the right as rooted in due process, equal protection, First Amendment, and privileges and immunities. *Christopher*, 536 U.S. at 415 n. 12. But whatever the source, the doctrine exists, entitling inmates to meaningful access to the courts.

capital postconviction counsel.

A. *Right to Meaningful Access to Postconviction Courts*

The Supreme Court's meaningful access cases have uniformly been concerned with preserving what the Court has called "a litigating opportunity,"⁵⁶ which, in the postconviction context, means the opportunity to bring "nonfrivolous"⁵⁷ postconviction challenges to the courts.⁵⁸ From the time the access doctrine surfaced, it has focused rather narrowly on prohibiting the government from imposing obstacles that directly impede access to the courts, rather than on imposing on the government potentially onerous affirmative obligations designed to *improve* access to the courts.⁵⁹ Thus, for example, the Court invalidated a prison regulation requiring inmates to have their petitions approved by prison officials,⁶⁰ as well as a prison regulation forbidding inmates from assisting one another in preparing legal documents.⁶¹ In both situations, the prison regulation presented a direct obstacle in the path of inmates seeking to bring their constitutional claims before the courts and accordingly constituted a denial of meaningful access.⁶²

Sometimes, however, meaningful access to the courts requires more than removal of obstacles—it requires affirmative steps designed to ensure "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."⁶³ As a general matter, this occurs when the lack of resources available in the

56. *Id.* at 414.

57. *Lewis*, 518 U.S. at 353 (footnote omitted).

58. *Id.* at 355.

59. *Id.* at 350, 354.

60. *Hull*, 312 U.S. 546. In *Hull*, the petitioner attempted to file an original habeas petition with the Supreme Court, only to have the petition intercepted by prison officials and returned. *Id.* at 547–48. Officials also intercepted a letter the petitioner wrote to the Court and forwarded it to a "legal investigator for the state parole board." *Id.* at 547 (footnote omitted). After reviewing the letter, the legal investigator responded to the petitioner, explaining that his "application in its present form would not be acceptable to th[e] court." *Id.* at 547 n. 1. All of these actions were taken pursuant to a prison regulation that required prisoners to submit "[a]ll legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals" first to the "institutional welfare office" and, if approved by that office, to the "legal investigator to the Parole Board." *Id.* at 548. Ultimately, the petitioner was able to smuggle a petition to his father, who filed it in the Supreme Court for him. *Hull*, 312 U.S. at 548. Upon review, the Supreme Court explained that although the government had sound reasons for the regulation, "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.* at 549. The Court's opinion also reflected a concern that the prison regulation interfered with, and perhaps usurped, federal court authority: "[w]hether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." *Id.*

61. *Johnson*, 393 U.S. 483. In *Johnson*, a Tennessee prison regulation prohibited inmates from assisting one another in the preparation of "[w]rits or other legal matters." *Id.* at 484. The Court invalidated the regulation, reasoning that it was no different than "a rule forbidding illiterate or poorly educated prisoners [from] fil[ing] habeas corpus petitions[]"—a rule "that Tennessee could not constitutionally adopt." *Id.* at 487. Because Tennessee did not provide "any other source of assistance for [illiterate] prisoners," *id.*, the regulation served as a direct obstacle in the paths of illiterate inmates seeking access to the courts and thus was unconstitutional. So Tennessee had a choice. It could enforce its prohibition on inmate assistance and establish another method of assistance for illiterate inmates in preparing their petitions, or it could simply lift its prohibition. *Id.* at 488–90. Notably, Tennessee would acquire an affirmative obligation to assist illiterate prisoners *only* if it insisted on shutting off the existing means of accessing the courts. *Johnson*, 393 U.S. at 489–90.

62. *Id.* at 487; *Hull*, 312 U.S. at 549.

63. *Lewis*, 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825).

prison “hinder[s]” a petitioner’s ability to prepare and properly file a petition.⁶⁴ There are no hard-and-fast rules regarding what steps a state must take to facilitate access; instead, the states are given ample latitude in selecting a program or policy that allows reasonable access to the courts.⁶⁵ Some states might choose to provide law libraries, while others might choose to provide access to some method of legal assistance.⁶⁶ As long as postconviction petitioners are able to prepare and properly file a petition, the meaningful access obligation is satisfied.⁶⁷ Conversely, if a petitioner is unable to prepare and properly file a postconviction petition and that inability *is caused by the government*—either because the government interfered with the preparation or filing or because the government’s assistance program was insufficient—then meaningful access is violated.⁶⁸

For a time, it appeared the access right might also require the government to undertake affirmative efforts to *optimize* the petitioner’s ability to prepare and file a postconviction petition.⁶⁹ This was the result of the Court’s decision in *Bounds v.*

64. *Id.* (holding “inmate . . . must . . . demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim”); see also *Younger v. Gilmore*, 404 U.S. 15 (1971) (summarily affirming the district court’s judgment requiring state prison to provide either a better array of legal materials or some other form of legal assistance to inmates); *Johnson*, 393 U.S. at 490 (holding that if the state insists on prohibiting inmates from assisting one another in preparing postconviction petitions, then the state must provide “some reasonable alternative to assist [illiterate] inmates in the preparation of petitions for post-conviction relief”).

65. *E.g. Lewis*, 518 U.S. at 349–51, 356–57 (emphasizing that government may select method of providing meaningful access); *Bounds*, 430 U.S. at 830 (explaining “that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal”).

66. *Bounds*, 430 U.S. at 830–31.

67. *Lewis*, 518 U.S. at 351 (“[P]rison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring ‘a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.’” (quoting *Bounds*, 430 U.S. at 825)).

68. The *Lewis* Court calls this the “actual injury” requirement. *Id.* at 349. To show a meaningful access violation, petitioners must demonstrate that the government’s conduct or program “hindered [their] efforts to pursue a legal claim.” *Id.* at 351. As *Lewis* explained, the petitioner

might show . . . that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Id.

69. The seeds of *Bounds* arguably were planted three years earlier, in *Procunier v. Martinez*, 416 U.S. 396 (1974). There, the Court addressed whether California’s prohibition on the use of paralegals or law students for purposes of interviewing inmates on behalf of the inmate’s attorney violated meaningful access. *Id.* at 419–22. The Court invalidated the regulation, explaining that the government cannot “unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts.” *Id.* at 419 (citation omitted). California’s ban undoubtedly impeded access to the courts, and, because California could not demonstrate the need for such a broad ban, its regulation was unconstitutional. *Id.* at 420–22. In the middle of its analysis, however, the Court said an interesting thing: “prison administrators are not required to adopt every proposal that may be thought to facilitate prisoner access to the courts.” *Id.* at 422 (emphasis added). Instead, “[t]he extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials.” *Procunier*, 416 U.S. at 420. This language suggests that although the government is not required to adopt every proposal, it *is required* to adopt proposals that do not unduly undermine the government’s legitimate interests. In other words, the access right would not only remove impediments but would also impose an obligation to adopt reasonable procedures to facilitate access.

Smith,⁷⁰ which held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of *meaningful legal papers* by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”⁷¹ While this and other language could be interpreted as dramatically expanding the access right,⁷² that reading never really took hold in the Supreme Court. Following the *Bounds* decision, the Court steadfastly resisted efforts to expand it, declining on two occasions to interpret the meaningful access right as imposing an affirmative obligation to supply postconviction counsel.⁷³ And more recently, in *Lewis v. Casey*,⁷⁴ the Court expressly rejected any reading of *Bounds* that would impose affirmative obligations on the government to *enhance* inmates’ access to the courts. As the Court explained, meaningful access does not entitle the prisoner to assistance that would “enable the prisoner to *discover* grievances [or] *litigate effectively* once in court.”⁷⁵ Instead, it requires only that prisoners “be able to present their grievances to the courts—a more limited capability that can be produced by a much more limited degree of legal assistance.”⁷⁶ In short, the access doctrine is not about assisting the petitioner in developing the best possible petition; instead, it is about (1) removing government-imposed hurdles that *directly interfere* with the petitioner’s ability to prepare and properly file the petition,⁷⁷ and (2) providing only “the minimal help necessary”⁷⁸ to facilitate such access.⁷⁹

While admittedly narrow, the Court’s construction of the access right in the postconviction context comports with the meaningfulness requirement. The purpose of the right itself—a core consideration in the meaningfulness analysis—is quite narrow. The right to access was intended to guarantee just that—access. It is about the ability to get in the courthouse door to “present” known claims to the judge for consideration on the merits.⁸⁰ In other words, what matters is the opportunity to bring known claims,⁸¹ not the content of the petition. Removing government-imposed obstacles and requiring the basic assistance necessary to facilitate preparation and filing are adequate and effective methods of ensuring access.

70. 430 U.S. 817.

71. *Id.* at 828 (emphasis added) (footnote omitted).

72. *Lewis*, 518 U.S. at 354.

73. *Giarratano*, 492 U.S. at 10–12; *Finley*, 481 U.S. at 555–57.

74. 518 U.S. 343.

75. *Id.* at 354 (emphasis in original).

76. *Id.* at 360.

77. *E.g. id.* at 350.

78. *Id.* at 360.

79. *E.g. Lewis*, 518 U.S. at 360; *see generally id.* at 354–64.

80. *Id.* at 356 (access right “confer[s] . . . a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement”); *Wolff*, 418 U.S. at 579 (explaining that the access right “assures that no person will be denied the *opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights*” (emphasis added)); *Johnson*, 393 U.S. at 485 (explaining that “it is fundamental that access of prisoners to the courts *for the purpose of presenting their complaints* may not be denied or obstructed” (emphasis added)); *Hull*, 312 U.S. at 549 (holding that “the state and its officers may not abridge or impair petitioner’s *right to apply* to a federal court for a writ of habeas corpus” (emphasis added)).

81. *See Christopher*, 536 U.S. at 414 (describing access right as “litigating opportunity”); *see also Lewis*, 518 U.S. at 354 (explaining that access claim does not entitle the prisoner to assistance that would “enable the prisoner to discover grievances” (emphasis omitted)).

To be sure, procedures designed to enhance the opportunity for success on the merits, rather than just facilitating access, would greatly assist capital petitioners in their postconviction pursuits. But such procedures, if required, would transform the right from simple access to enhanced or perfect access. And the meaningfulness requirement has never been about perfection. Instead, “adequate” and “effective” are the relevant watchwords.⁸² Finally, and perhaps most importantly in this context, procedures to optimize, rather than merely facilitate, access would unduly aggravate state sovereignty interests. Optimization of access would not only be incredibly costly for the states, but it also would have no practical ending point; every time a better procedure or program arises, states would be obligated to adopt it. Meaningfulness requires a balance of competing interests, and if the government has developed and implemented an adequate system of access, that balance has been achieved.

For these reasons, it is perhaps not surprising that requests for counsel to facilitate access to the courts have been unsuccessful.⁸³ Assistance of counsel before the petition is filed is an important, indeed critical, means of assisting petitioners in discovering and raising all possible claims.⁸⁴ This is no secret. In fact, it was one of the reasons why the Alabama death-row inmates sought counsel in the *Barbour* case.⁸⁵ But, again, the access right does not include the right to “discover grievances [or the right] to litigate effectively.”⁸⁶ It is not a vehicle to improve the content of the petition. Thus, the complexity of postconviction proceedings, upon which the *Barbour* plaintiffs relied,⁸⁷ should be relevant only to the extent that it signals the need for the government to provide enough basic assistance to allow petitioners the ability to file petitions.⁸⁸ While it is true that the presence of counsel makes it easier to file a postconviction petition, the right of access does not guarantee the easiest manner of access. Instead, it requires “reasonable” or “adequate” access.⁸⁹ If petitioners can file petitions stating their

82. See *Evitts*, 469 U.S. at 393; *Bounds*, 430 U.S. at 822; *Griffin*, 351 U.S. at 20; see also *Lewis*, 518 U.S. at 351 (describing meaningful access as “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts” (emphasis added) (quoting *Bounds*, 430 U.S. at 825)); *McConville*, *supra* n. 1, at 70 (describing meaningfulness requirement).

83. In *Finley*, for example, the Court relied on the nature of postconviction review, the availability of other means of presenting claims, and state sovereignty interests in holding that counsel was not constitutionally required during state postconviction review. 481 U.S. at 555–59; see also *Giarratano*, 492 U.S. at 7–12 (relying on similar considerations to conclude that counsel is not required in capital postconviction proceedings).

84. See e.g. ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 930–31 (2003); *McConville*, *supra* n. 1, at 80–84; Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* 2, <http://www.texasdefender.org/chapters.pdf> (2002).

85. *Barbour*, 410 F. Supp. 2d at 1133; *Barbour* Br. 26–30.

86. *Lewis*, 518 U.S. at 354 (emphasis in original); see also *Barbour*, 410 F. Supp. 2d at 1133 (“In short, the plaintiffs['] demand is the very demand that *Lewis* foreclosed: a demand that inmates be provided the litigation capacity to develop claims not contemplated or not known.” (footnote omitted)).

87. *Barbour*, 410 F. Supp. 2d at 1133; *Barbour* Br. 28–32.

88. The *Barbour* court ruled that “the complexity of the postconviction process and the difficulties of surmounting it without counsel cannot as a matter of law be equated to a denial of meaningful access.” *Barbour*, 410 F. Supp. 2d at 1133. While this may be true, the complexities of postconviction review should at least be relevant to the question of access.

89. See *Lewis*, 518 U.S. at 351 (describing access right as “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts” (quoting *Bounds*, 430 U.S. at 825)); *Procunier*, 416 U.S. at 419 (holding that access right “means that inmates must have a reasonable opportunity

nonfrivolous, known claims⁹⁰—as inartful as the petitions might be—then there has been no denial of access.⁹¹

Although counsel typically will not be required to satisfy the requirements of meaningful access, one could argue that counsel *might* be required if a petitioner could show that the petition “was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known.”⁹² As the *Lewis* Court seemed to recognize, if the access right means anything, it must mean the ability to properly file the petition.⁹³ Such an argument, however, likely will face several obstacles. Take, for example, one of the alleged injuries suffered by some of the *Barbour* plaintiffs. As evidence of denial of access, plaintiffs pointed to numerous *pro se* petitions that had been dismissed for failure to comply with Alabama’s statute of limitations⁹⁴—a “technical requirement” if ever there were one.⁹⁵ To state a claim for denial of access, however, plaintiffs likely would have to demonstrate either that information regarding the statute of limitations simply did not exist either in the prison library or through a prison legal assistance program, or, if the information did exist in either of these places, that Alabama denied the plaintiffs an opportunity to discover the information.⁹⁶ Moreover, even if Alabama *caused* the

to seek and receive the assistance of attorneys”); *Johnson*, 393 U.S. at 490 (holding that the state must provide “some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief” if the state insists on “enforc[ing] a regulation . . . barring inmates from furnishing such assistance to other prisoners” (footnote omitted)).

90. *Lewis*, 518 U.S. at 351–53.

91. *See id.* at 351 (holding that the petitioner must show that the government’s program “hindered his efforts to pursue a legal claim”).

92. *Id.*

93. The *Lewis* Court’s explanation of how to properly state an access claim is instructive in this regard: if an inmate is dissatisfied with the prison law library or legal assistance,

the inmate . . . must . . . demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was *dismissed* for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was *unable even to file a complaint*.

Id. (emphasis added).

94. According to the *Barbour* plaintiffs,

[w]hen this lawsuit was filed in December of 2001, there were thirty-seven death-row prisoners without legal representation facing imminent filing deadlines. Since the commencement of this action, of the thirty-seven cases, six have since been dismissed without review because they did not file in time, [and] another seven are at risk of summary dismissal because the State has asserted that they did not file in time.

Barbour Br. 37 (footnotes omitted).

95. In 2002, Alabama changed its statute of limitations from two years to one year. Ala. R. Crim. Proc. 32.2(c).

96. *See Lewis*, 518 U.S. at 351 (discussing need to show that the state’s system “hindered [petitioner’s] efforts to pursue a legal claim”). In their brief opposing summary judgment, the *Barbour* plaintiffs challenged the adequacy of Alabama’s library materials, as well as their access to such materials. Specifically, they argued that the legal materials

consist[ed] of (1) a small collection of volumes in which many reference works indispensable for the informed pursuit of postconviction litigation are so outdated as to be useless or affirmatively misleading, or are missing entirely, and (2) an arrangement by which death-row inmates are permitted to request specific, named books from the larger collection maintained for the non-death-row prison population but are not even given a *list* of the books housed in this larger collection, let

dismissals because it failed to provide either the necessary information or an opportunity to discover it, the plaintiffs must still convince a court that the assistance of counsel is the *only* feasible remedy—a tough (if not impossible) task, given the wide latitude afforded the states in determining how to solve access problems.⁹⁷ Finally, plaintiffs would be entitled to a system-wide remedy (i.e., mandatory appointment of counsel for all capital inmates *before* the petitions are due) only if they demonstrate system-wide injuries.⁹⁸ To do this, plaintiffs would have to show that prisoners across Alabama's death row were denied access to the statute of limitations information *and* had their petitions dismissed as a result.

In sum, the likelihood that a right to counsel will ever be part of the access requirement is extremely remote. Justice Scalia made this painfully clear in *Lewis* when he explained why the access right did not include the right to develop claims and “litigate effectively once in court.”⁹⁹ In his words, “[t]o demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.”¹⁰⁰ Thus, any attempt to argue about the quality of counsel's assistance, the timing of the appointment, or the discretionary nature of the right must find another outlet. And that outlet is the meaningful right to capital postconviction counsel.

B. *The Meaningful Right to Capital Postconviction Counsel*

The government has no constitutional obligation to provide postconviction counsel to indigent capital inmates.¹⁰¹ Nevertheless, the vast majority of death penalty jurisdictions have voluntarily decided to grant statutory rights to counsel,¹⁰² and these decisions, like the decision to provide a postconviction remedy, trigger application of the meaningfulness requirement.¹⁰³ Unlike the access strand of the meaningfulness requirement, however, the capital postconviction counsel strand is very much concerned with the quality of the case put forth on behalf of the petitioner, precisely because “the purpose of appointing postconviction counsel in the first place . . . is to protect the defendant's constitutional rights.”¹⁰⁴ To accomplish this, counsel must carefully navigate the process of postconviction review, which requires not only thorough

alone any means to guess, from a distance, what information might be contained in what books.

Barbour Br. 3 n. 2 (emphasis in original); see also *id.* at 33 n. 32 (arguing that “Alabama death-row prisoners [were unable] to access adequate law library materials, books and statutes”). If the plaintiffs' challenge included specific evidence supporting lack of access to information regarding the statute of limitations, then they just might have cleared the first of several hurdles in proving the denial of meaningful access.

97. *Lewis*, 518 U.S. at 352–53 (emphasizing the states' flexibility in designing a program for meaningful access); *Bounds*, 430 U.S. at 830–32 (explaining that “a legal access program need not include any particular element we have discussed, and we encourage local experimentation”).

98. *Lewis*, 518 U.S. at 360.

99. *Id.* at 354 (emphasis omitted).

100. *Id.*

101. *Giarratano*, 492 U.S. at 10; *Finley*, 481 U.S. at 555–59.

102. McConville, *supra* n. 1, at 34–35.

103. *Id.* at 80–84.

104. *Id.* at 88.

knowledge of substantive and procedural law but also investigation of the crime and the defendant's background, discovery of all possible claims, and timely filing of the petition in the proper court.¹⁰⁵ Accordingly, in the context of statutorily granted capital postconviction counsel, the nature and quality of counsel's assistance, as well as the complexity of the postconviction process, are directly relevant to the meaningfulness analysis.

To satisfy the meaningfulness requirement, statutory grants of capital postconviction counsel must include a right to effective assistance of counsel, which means counsel who *actually performs competently*, not just counsel who possesses the capability of doing so.¹⁰⁶ But unlike the effectiveness guarantee attached to constitutional grants of counsel, this guarantee is not enforced through a post-performance review process. Because of the postconviction context and the attendant concerns for state sovereignty interests, particularly delay and finality, the postconviction effectiveness guarantee is enforced by (1) ensuring counsel's compliance with rigorous competency standards and (2) monitoring counsel's performance during the actual postconviction proceeding.¹⁰⁷

The question raised by Alabama's system is whether discretionary grants and delayed appointments undermine the meaningfulness requirement. This question is addressed below.

II. THE MEANINGLESSNESS OF ALABAMA'S GRANT OF CAPITAL POSTCONVICTION COUNSEL

The State of Alabama provides a discretionary right to capital postconviction counsel.¹⁰⁸ That is, if the postconviction court believes counsel is necessary to "assert or protect" an indigent capital petitioner's rights, the court must appoint counsel.¹⁰⁹ Alabama, however, does not make the counsel determination until *after* the petitioner has filed the petition *pro se* and survived summary dismissal.¹¹⁰ As explained below, both features of Alabama's counsel system—discretionary grants and delayed appointment—render its statutory grant of capital postconviction counsel meaningless.

105 *Id.* at 88–89.

106 *Id.* at 87–98.

107 McConville, *supra* n. 28, at 543–98 (discussing the scope and substance of the monitoring requirement); McConville, *supra* n. 1, at 104–10 (arguing that monitoring is required to ensure a meaningful right to capital postconviction counsel).

108 Ala. Code § 15-12-23(a); Ala. R. Crim. Proc. 32.7(c).

109 Ala. Code § 15-12-23(a); Ala. R. Crim. Proc. 32.7(c).

110 *See* Ala. R. Crim. Proc. 32.7(c) (listing absence of summary dismissal as a condition precedent to discretionary grant of counsel); Jenkins, 2005 WL 796809 at *5 (describing the process for appointment of capital postconviction counsel). According to the *Barbour* plaintiffs, Alabama frequently seeks summary dismissal:

The Alabama Attorney General's Office routinely files motions to dismiss claims in petitions filed *pro se* by death-row prisoners on procedural grounds such as lack of specificity (pursuant to Rule 32.6(b)), to dismiss petitions for failure to state a claim upon which relief may be granted (pursuant to Rule 32.7(d)), and/or to dismiss claims as procedurally barred (pursuant to Rule 32.2).

Barbour Br. 30. Counsel for plaintiffs—lawyers for EJI—would be in a position to know about the government's habits in this regard, as EJI lawyers (or lawyers "recruited by EJI, or supported by EJI") frequently represent Alabama death row inmates on postconviction review. *Id.* at 4.

A. *Delayed Appointment*

Alabama's delayed appointment system plays a key role in making its right to counsel nothing more than a "futile gesture."¹¹¹ The purpose of supplying postconviction counsel to capital inmates is to protect their rights.¹¹² Indeed, Alabama's statute makes this purpose quite clear: the trial "court shall appoint counsel" if it determines "that counsel is *necessary to assert or protect the rights of the petitioner*."¹¹³ The problem, however, is that Alabama has established a system that makes this goal extraordinarily difficult, if not impossible, to achieve.

To protect the rights of capital postconviction petitioners, appointed counsel must lead petitioners successfully through the complex maze of postconviction procedures, being sure to preserve *all* permissible claims.¹¹⁴ This, in turn, is accomplished in only one way: by investigating, discovering, and properly raising all permissible claims in the proper court.¹¹⁵ This is no easy feat, for as the Texas Defender Service explains:

[t]o present any arguably meritorious claim, the state habeas counsel must perform a thorough investigation of the case, starting with the written record of the trial, but exploring far beyond it. The lawyer must contact and interview all important witnesses, scrutinize the files of all previous defense attorneys, look for issues inadequately investigated or presented and examine the state's case file for evidence that may have been withheld from the defense or for indications that state witnesses may have given false or misleading testimony. The lawyer must investigate and gather all available mitigating information about the defendant's background, including any history of mental health problems, brain damage, genetic disorders or physical or sexual abuse. The state habeas lawyer must uncover any new evidence of violations of the defendant's rights, information demonstrating that the conviction or sentence was tainted by error of constitutional magnitude, but was not presented to the jury.¹¹⁶

111. *Evitts*, 469 U.S. at 397; see *Douglas*, 372 U.S. at 358.

112. See e.g. *McConville*, *supra* n. 1, at 85–86 (citing numerous sources supporting idea that the purpose of counsel is to protect constitutional rights).

113. Ala. R. Crim. Proc. 32.7(c) (emphasis added).

114. See e.g. *McConville*, *supra* n. 1, at 80–82 (describing the role of postconviction counsel); Texas Defender Service, *supra* n. 84, at 12–13 (explaining that state "habeas attorney must err on the side of thoroughness" and raise "every possible legal argument").

115. See e.g. *Barbour Br.* 28–29; *McConville*, *supra* n. 1, at 89; Texas Defender Service, *supra* n. 84, at 10. A thorough investigation can lead to the discovery of evidence demonstrating innocence or evidence supporting a life sentence rather than a death sentence. For example, an investigation might uncover evidence of an alibi, or it might reveal mitigation evidence that, had trial counsel discovered and raised it during the penalty phase, would very likely have convinced the jury to vote against capital punishment. In fact, the Supreme Court recently decided two cases in which postconviction counsel discovered significant mitigation evidence missed by trial counsel, and in both cases the Court found the evidence sufficient to support a claim of ineffective assistance of trial counsel. *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Ineffectiveness claims tend to require investigation for evidence outside the record. Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 Brandeis L.J. 793, 795–99 (2004) (discussing Supreme Court's decision in *Massaro v. U.S.*, 538 U.S. 500 (2003), and reasons why ineffective assistance claims tend to require evidence outside the record). However, such investigatory efforts by postconviction counsel are likely to be worth the time, as a recent study shows that ineffective assistance of counsel claims have been quite successful on state postconviction review. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995* app. C-3 (Colum. L. Sch. Pub. L. & Leg. Theory Working Paper Group, June 20, 2000) (available at <http://www.thejusticeproject.org/press/reports/liebman-part-1.html>).

116. Texas Defender Service, *supra* n. 84, at 12.

By their very nature, counsel's tasks must be accomplished before the petition has been filed.¹¹⁷ So by delaying the appointment determination until after the petition has been filed and survived summary dismissal, Alabama effectively *eliminates* counsel's key responsibilities and places them *back in the hands of the petitioner*.

Alabama's system might be defensible if capital petitioners were capable of adequately protecting their own rights in the pre-filing period. But as the Supreme Court and others have pointed out, capital inmates in general are simply ill-equipped to guide themselves through this process in a successful manner.¹¹⁸ As is typical among the states,¹¹⁹ Alabama limits its postconviction remedy to claims that (1) could not be raised at trial or on direct appeal and (2) were not "raised or addressed" at trial or on direct appeal.¹²⁰ Because these are "new" claims in the sense that they have not been raised and developed in earlier proceedings, capital petitioners do not have the luxury of relying on briefs or memoranda prepared by counsel at trial or on direct appeal for assistance in identifying, developing, and articulating their claims.¹²¹ Moreover, as a general matter, evidence supporting these claims exists outside the record,¹²² forcing petitioners to

117. See e.g. *Barbour* Br. 28 (describing work necessary to prepare petition); Texas Defender Service, *supra* n. 84, at 12 (same).

118. See e.g. *Jenkins*, 2005 WL 796809 at *5 (explaining difficulties incarcerated petitioners face in preparing postconviction petition); *McFarland*, 512 U.S. at 855–56 (explaining that "[t]he complexity of our [habeas] jurisprudence . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law" (quoting *Giarratano*, 492 U.S. at 14 (Kennedy & O'Connor, JJ., concurring))); *Barbour* Br. 33 (noting that "an indigent death-row prisoner cannot uncover the new facts and evidence necessary to sufficiently plead a [postconviction] claim"); *Dripps*, *supra* n. 115, at 799 (explaining that postconviction petitioners will have difficulty gathering sufficient evidence to mount successful ineffective assistance of counsel challenges); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. App. Prac. & Process 347, 395 (2003) (explaining that capital petitioners are unable to represent themselves because, inter alia, "[n]o death-row inmate will ever be set free from his prison cell to perform the thorough, independent investigation of his case that is a fundamental component of competent habeas representation" (internal quotation and footnote omitted)); Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 Loy. L. Rev. 55, 66–78 (1999) (explaining results of study showing inability of death-row inmates to represent themselves on postconviction review).

119. Larry W. Yackle, *Postconviction Remedies* §§ 5, 10 (Laws. Coop. Publ. Co. 1981).

120. Ala. R. Crim. Proc. 32.2(a). The law contains an exception for claims alleging that "[t]he court was without jurisdiction to render judgment or to impose sentence," *id.* at 32.1(b), if such claims "could have been but [were] not raised at trial" or "on appeal." *Id.* at 32.2(a)(3), (a)(5).

121. *Cf. Ross*, 417 U.S. at 615 (holding that counsel was not required on discretionary review because courts can refer to trial record, briefs, and court opinion in determining whether to grant review).

122. Alabama follows the "well-established rule that appellate courts are not permitted to consider matters outside the record in the particular proceedings under review." *Wilson v. State*, 830 So. 2d 765, 787–88 (Ala. Crim. App. 2001) (Shaw, J., dissenting); see also *Reynolds v. State*, 615 So. 2d 94, 96 (Ala. Crim. App. 1992) ("Claims of inadequate representation cannot be determined on direct appeal where such claims were not raised before the . . . [trial] court and there has been no opportunity to develop and include in the record evidence bearing on the merits of the allegation." (quoting *Kelley v. State*, 568 So. 2d 405, 412 (Ala. Crim. App. 1990))); Yackle, *supra* n. 119, at § 1 ("In most jurisdictions there are strict time limits for taking direct appeals from adverse judgments, appellate courts usually decline to go beyond the record to look for error, and except in extraordinary circumstances they refuse to consider errors that are of record in the absence of a contemporaneous objection below."). So if a claim was not (and could not be) raised and developed at trial, or in a hearing on a motion for a new trial, and it depends upon evidence outside the record, the criminal defendant must wait to raise it on postconviction, as it will be improper on direct review. See *Wilson*, 830 U.S. at 787–88 (Shaw, J., dissenting); see also *Apicella v. State*, 2006 WL 1452927 at **4–5 (Ala. Crim. App. May 26, 2006) (challenge to death sentence was appropriate on postconviction review because it "could not have been raised at trial or on appeal" because evidence supporting the claim did not exist until several years after trial and sentencing and was thus outside the record); *Brown v. State*, 903 So. 2d 159, 164 (Ala. Crim. App.

investigate, discover, and properly raise all permissible claims on their own. This is extremely difficult to do, for postconviction petitioners lack the knowledge, training, and resources necessary to complete these tasks sufficiently.¹²³ As the Alabama Supreme Court explained:

Because most [postconviction] petitioners are imprisoned, [their] petitions are often based on a preliminary and restricted investigation of the claims asserted. Furthermore, an incarcerated inmate who does not have legal counsel is obviously hampered in his or her ability to interview witnesses, to gather records, to investigate factual questions, and to conduct legal research.¹²⁴

Three potential pitfalls await the uncounseled capital postconviction petitioner. First, the petitioner faces a substantial risk that she will simply fail to discover, and therefore raise, a relevant claim in the first state petition. This failure has drastic consequences, for except in very narrow circumstances, claims not raised in the first petition cannot be raised in a later petition.¹²⁵ And because the claim would not be addressed on the merits in state court, it would be procedurally defaulted on federal habeas review.¹²⁶ Losing the opportunity for review at the federal level is particularly devastating, as a recent study showed that forty percent of federal habeas petitions are reversed during federal habeas review.¹²⁷

Second, even if the petitioner discovers and raises all relevant claims, the petition will be summarily dismissed unless she can state these claims with “sufficiency”¹²⁸ and

2004) (claim of ineffective assistance proper on postconviction review when “the trial transcript was not prepared in time for appellate counsel to have reviewed [it], . . . determined whether any claim of ineffective assistance of trial counsel was viable,” and included it in the motion for new trial) (citation omitted).

123. See *Barbour* Br. 38 (explaining that “[i]n the last few years, at least seven Alabama death-row prisoners” proceeded *pro se* and that “[a]ll of these prisoners either have had their cases dismissed or have been otherwise precluded from state-court review as a result of their inability to obtain adequate legal assistance” (emphasis in original)).

124. *Jenkins*, 2005 WL 796809 at *5; see also *Barbour* Br. 33 (noting that “an indigent death-row prisoner cannot uncover the new facts and evidence necessary to sufficiently plead a claim under Rule 32” and that “no pre-filing assistance is offered to death-row prisoners” (footnote omitted)).

125. Ala. R. Crim. Proc. 32.2(b); see *Whitt v. State*, 827 So. 2d 869, 876 (Ala. Crim. App. 2001) (postconviction claim filed by *pro se* capital petitioner properly dismissed as successive because it was not raised in first petition). Claims of ineffective assistance can *never* be raised in a successive petition. Ala. R. Crim. Proc. 32.2(d). To raise a new claim in a successive petition (other than an ineffectiveness claim), the petitioner must show that

(1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) . . . that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.

Id. at 32.2(b). If Alabama does not see fit to provide counsel before the petition is filed, it is unlikely that the petitioner could cite lack of assistance as “cause” for the failure to uncover the information at an earlier date.

126. 28 U.S.C. § 2254(b)(1); see also *Coleman*, 501 U.S. at 731, 750; *Wainwright v. Sykes*, 433 U.S. 72, 80–81 (1977).

127. Liebman, Fagan & West, *supra* n. 115, at 6.

128. Under Alabama law, summary dismissal is appropriate whenever “the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief.” Ala. R. Crim. Proc. 32.7(d); see also *id.* at 32.6(b) (“The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.”). For examples of claims that lack the necessary specificity, see *Shaw v. State*, 2006 WL 825142 at *2 (Ala. Crim. App. Mar. 24, 2006) (petitioner’s claims of ineffective assistance “are merely bare allegations attacking various strategic decisions made by counsel during the course of Shaw’s

in a manner the court will understand.¹²⁹ Like failure to raise a claim, summary dismissal for failure to comply with a state procedural rule will prevent review in both state and federal court.¹³⁰ To withstand dismissal, “[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.”¹³¹ But such fulsome allegations will be difficult to produce without a full-blown investigation—something postconviction petitioners cannot do on their own.¹³² For example, a petitioner might be aware that her trial counsel conducted only a cursory mitigation investigation, but because of her inability to interview witnesses or obtain and review records, she might lack the evidence to demonstrate what counsel missed.¹³³ Moreover, if the petitioner is unable to draft a petition capable of surviving summary dismissal, then the odds are fairly high¹³⁴ that she

trial and appeal” and thus “fail to meet the specificity requirement of Rule 32.6(b)”; *Jenkins*, 2005 WL 796809 at *4; *Coral v. State*, 900 So. 2d 1274, 1280–83 (Ala. Crim. App. 2004) (petitioner’s ineffective assistance claims failed to include “specific facts to support the allegation[s]”); *Scroggins v. State*, 827 So. 2d 878, 881–82 (Ala. Crim. App. 2001) (petitioner failed to adequately support or explain numerous claims). The *Barbour* plaintiffs alleged that Alabama “routinely files motions to dismiss claims in petitions filed *pro se* by death-row prisoners on procedural grounds such as lack of specificity.” *Barbour* Br. 30.

129. *Cf. Smith v. State*, 479 A.2d 1309, 1312 (Me. 1984) (explaining that assistance of counsel is useful because “the post-conviction court . . . will be in a better position to assure that a worthy claim is not lost [because of] petitioner’s linguistic deficiencies”).

130. *See Coleman*, 501 U.S. at 731, 750; *Sykes*, 433 U.S. at 80–81.

131. Ala. R. Crim. Proc. 32.6(b).

132. *See Barbour* Br. 40 (describing *pro se* petition dismissed for lack of specificity). If the *Barbour* plaintiffs are correct in asserting that the government regularly seeks summary dismissal, *see id.* at 30–31, then this is a gauntlet most Alabama capital petitioners will likely have to face. One recent capital postconviction case provides potential insight into the government’s tenacious use of motions for summary dismissal, whether or not the grounds for such dismissal are defensible. In *Apicella*, 2006 WL 1452927, the government filed no less than five motions for summary dismissal. The first motion argued that the petition was filed out of time, but the trial court denied the motion upon finding the petition to be timely. *Id.* at *1. The second and third motions for summary dismissal related to petitioner’s amended petition, raising procedural bar (second motion) and insufficient pleading (third motion) arguments. *Id.* The government did, however, “indicate[] [that] it would not oppose if the trial court granted [petitioner] 30 days to amend the claims that were not sufficiently pleaded.” *Id.* The trial court ordered an evidentiary hearing on petitioner’s ineffective assistance claims (which the government alleged were insufficient), but, before the scheduled hearing, the state subsequently withdrew motions two and three and filed a fourth motion for summary dismissal, this time only on grounds of insufficiency. *Id.* The petitioner then filed a second amended petition, prompting the government to file a fifth, and final, motion for summary dismissal. *Apicella*, 2006 WL 1452927 at *2. The trial court granted the fifth motion before the scheduled evidentiary hearing, which of course never went forward. *Id.* The government’s fortunes changed on appeal, however, when the appellate court reversed the trial court’s summary dismissal with respect to a claim the trial court ruled was procedurally barred because it should have been raised during trial. *Id.* at *5. As the appellate court explained, the evidence supporting the claim came into existence *after* the trial, making it impossible to raise on either trial or appeal and thus appropriate for postconviction review. *Id.* at *4. If *Apicella* is representative of Alabama’s attitude toward postconviction petitions, *pro se* petitioners will be buried in summary dismissal motions. And while Mr. Apicella was on the winning side of the summary dismissal war in his case, given the general difficulty with discovering and supporting permissible postconviction claims, it is unlikely that many other petitioners will meet with similar success.

133. *See Dripps*, *supra* n. 115, at 799 (explaining that postconviction petitioners will have difficulty “attempting to prepare to develop the kind of record” necessary to mount a successful ineffectiveness challenge); *cf. Texas Defender Service*, *supra* n. 84, at 16–17 (“[I]f the claimed error was that the trial counsel failed to investigate a particular issue, the habeas lawyer must provide the court with specific factual information that could have been located by the trial lawyer and probably would have changed the outcome of the trial.” (footnote omitted)).

134. This is not to say that it is impossible. *See Apicella*, 2006 WL 1452927 at *5 (reversing summary dismissal with respect to one claim); *Scroggins*, 827 So. 2d at 880–81 (reversing summary dismissal with respect to several claims).

will be unable to marshal sufficient facts and arguments to persuade the court that it incorrectly dismissed the petition.¹³⁵ And it does not help matters that the postconviction petition will “be assigned to the sentencing judge where possible,”¹³⁶ as that judge might not be very receptive to the petitioner’s claims.¹³⁷

Third, the petitioner must prepare and file a complete petition as quickly as possible. Alabama imposes a stringent one-year limitations period, and failure to file within that time period results in summary dismissal¹³⁸ (which in turn results in forfeiture of all claims in the petition).¹³⁹ But as the *Barbour* plaintiffs emphasized, petitioners must file their state petitions *well in advance* of the one-year deadline in order to preserve time to prepare and file a federal habeas petition within the federal limitations period.¹⁴⁰

The foregoing critique of delayed appointments finds strong support in the Supreme Court’s decision in *McFarland v. Scott*,¹⁴¹ a statutory interpretation case addressing the proper timing for the appointment of federal habeas counsel. By statute, indigent capital inmates who wish to seek federal habeas review possess a mandatory right to counsel.¹⁴² The statute failed to specify, however, whether the right attached

135. It does not appear that Alabama appoints counsel to appeal the grant of summary dismissal. See Ala. R. Crim. Proc. 32.7(c) (Counsel can be appointed “[i]f the court does not summarily dismiss the petition.”).

136. Ala. R. Crim. Proc. 32.6(d).

137. See Daniel S. Medwed, *Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 Ariz. L. Rev. 655, 659–60 (2005) (arguing that having the original trial court determine claims for postconviction relief might be problematic because the judge “may have a vested interest in the outcome, and that judge’s decision normally receives tremendous deference on appeal” (footnotes omitted)); but see Dripps, *supra* n. 115, at 796 (suggesting that it would be beneficial to have original trial judge evaluate ineffectiveness challenges raised on postconviction review). In Alabama, the sentencing judge can impose the death penalty even if the jury recommends a sentence of less than death. Ala. Code § 13A-5-47(e) (Lexis 2005) (“While the jury’s recommendation concerning sentence shall be given consideration, it is not binding upon the court.”). In these instances in particular, the sentencing judge might be less than sympathetic to the petitioner’s claims.

138. Ala. R. Crim. Proc. 32.2(c). Alabama’s one-year limitations period begins to run upon “the issuance of the certificate of judgment by the Court of Criminal Appeals . . . or . . . in the case of a conviction not appealed to the Court of Criminal Appeals . . . [once] the time for filing an appeal lapses.” Ala. R. Crim. Proc. 32.2(c). The *Barbour* plaintiffs provided examples demonstrating the government’s desire to enforce the statute of limitations. *Barbour* Br. 35–37. They also indicated that, at the time they filed their brief opposing summary judgment, numerous capital petitioners were at risk for missing the filing deadline. *Id.* at 9 (“At the latest count, seven indigent death-row inmates have statutes of limitations running and no lawyers to assist them to meet the limitations deadlines by filing Rule 32 petitions that will state a claim sufficient to begin the state and federal post-appeal process.” (footnote and citation omitted)).

139. *Coleman*, 501 U.S. at 750.

140. *Barbour* Br. 5–6, 41. The one-year federal limitations period begins to run once the “judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,” 28 U.S.C. § 2244(d)(1)(A), which means when the Supreme Court’s review on *certiorari*, or the time for seeking such review, has ended. *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998). The federal period is tolled upon the proper filing of a state postconviction petition. 28 U.S.C. § 2244(d)(2). State petitioners, therefore, must file as soon as possible in order to preserve time to prepare and file the federal petition. But as the *Barbour* plaintiffs explained:

[Because of] the state’s failure to provide legal assistance, many death row prisoners have spent most of the [one-year federal limitations period] trying to find counsel. Consequently, many have filed shell petitions or pleadings prepared by law students or staff at EJI at the last minute, leaving inadequate time to pursue federal postconviction review when the state court process is completed.

Barbour Br. 41 (citation omitted).

141. 512 U.S. 849.

142. At the time *McFarland* was decided, the mandatory counsel provision for capital habeas petitioners was

before or after filing the petition.¹⁴³ Relying on the complexity of federal habeas doctrine, as well as its own doubt regarding the ability of capital petitioners to prepare a petition on their own, the Court interpreted the statute to allow such petitioners to seek counsel before filing their postconviction petitions.¹⁴⁴ Of particular concern was the risk that a petitioner's "habeas claims never would be heard on the merits" if she had to "proceed without counsel in order to obtain counsel."¹⁴⁵ Congress, the Court reasoned, "did not intend for the express requirement of counsel to be defeated in this manner."¹⁴⁶ Justice O'Connor spoke even more plainly in her concurring opinion: "[i]t is almost meaningless to provide a lawyer to pursue claims on federal habeas if the lawyer is not available to help prepare the petition."¹⁴⁷

Although *McFarland* was a statutory interpretation case, its analysis is instructive, for whether the issue is one of statutory interpretation or due process, the underlying question is meaningfulness—the reasonable achievement of the statute's purpose. Thus, if delayed appointment would undermine Congress' grant of counsel, then delayed appointment must also undermine Alabama's grant of counsel.

One might argue that delayed appointment is not *always* disastrous for petitioners, and in those circumstances at least, delayed appointment does not violate the meaningfulness requirement. It is possible, for example, that an inmate's petition will survive summary dismissal and that counsel will be appointed to assist the petitioner on a going forward basis. No harm, no foul. But this argument fails for several reasons. First, petitioners who survive summary dismissal will not automatically receive court-appointed counsel because, as mentioned above, the right to counsel is discretionary. Second, even if the court appoints counsel, counsel's efforts to represent the petitioner will be severely crippled. After the petition has been filed, there will be much less time to conduct the all-important investigation—reviewing the record, analyzing evidence, interviewing witnesses, and evaluating the performance of trial and appellate counsel. Instead of trying to cull the landscape for all possible claims—the primary job of any postconviction counsel—counsel will be forced to focus myopically on developing and presenting the existing claims, preparing for a potential evidentiary hearing, and responding to motions and briefs filed by the government. Third, even if counsel is somehow able to discover additional claims, these claims will not be considered on the merits unless the court allows the petitioner to amend the petition. This can be difficult

codified at 21 U.S.C. § 848(q)(4)(B). 512 U.S. at 854. The mandatory counsel provision for such petitioners is now codified at Pub. L. No. 109-177, 18 U.S.C. § 3599(a)(2), 120 Stat. 231 (2006).

143. *McFarland*, 512 U.S. at 854.

144. As the Court explained:

An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial, because "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."

Id. at 855–56 (quoting *Giarratano*, 492 U.S. at 14 (Kennedy & O'Connor, JJ., concurring)).

145. *Id.* at 856.

146. *Id.*

147. *Id.* at 860 (O'Connor, J., concurring in part and dissenting in part). Like the majority, Justice O'Connor expressed concern that uncounseled petitioners would be unable to support their claims adequately and would risk summary dismissal if the petitions "appear on their face to be meritless." *McFarland*, 512 U.S. at 860.

to do in Alabama even though under Alabama law amendments are permissible “at any stage of the proceedings prior to the entry of judgment”¹⁴⁸ and “[l]eave to amend shall be freely granted.”¹⁴⁹ Postconviction courts in Alabama retain discretion to deny motions to amend if “the petitioner has unduly delayed filing the amendment or [if] an amendment [would] unduly prejudice[] the State.”¹⁵⁰ Although it is unlikely that a court would find undue delay on the petitioner’s part given that she recently received counsel, it is quite possible that the court would find undue prejudice to the state. Indeed, in *Jenkins*, the Alabama Supreme Court explained that a court would be justified in denying a motion to amend if “on the eve of an evidentiary hearing, a Rule 32 petitioner filed an amendment that included new claims of which the State had no prior notice and as to which it was not prepared to defend.”¹⁵¹ This means that newly appointed counsel must find and raise all new claims *as quickly as possible* or face a real risk that the court will not permit an amendment. In short, counsel cannot reasonably be expected to complete pre- and post-filing work during the very same time period. Cramming work into the post-filing time period unnecessarily hampers the quality of counsel’s performance, thus undermining the delivery of effective assistance.¹⁵²

In sum, if the point of providing capital postconviction counsel is to protect the rights of postconviction petitioners—and by Alabama’s own admission, this assuredly is the point—Alabama’s system fails miserably. Delaying appointment removes counsel

148. Ala. R. Crim. Proc. 32.7(b).

149. *Id.* at 32.7(d). If the trial court’s rulings in *Wilson v. State*, 911 So. 2d 40 (Ala. Crim App, 2005), are any indication of how trial courts handle amendment motions, then petitioners will face an uphill battle when seeking to amend their petitions—at least when they are before the trial court. In *Wilson*, the trial court denied all five motions to amend filed by counsel on behalf of a capital petitioner even though all of the motions were filed before the two-year limitations period expired. *Id.* at 44–45. Moreover, three of the five amendment motions contained allegations designed to respond to the government’s answer and an affidavit by petitioner’s lead trial counsel, which the government filed to support its answer in connection with petitioner’s claims of ineffective assistance of counsel. *Id.* at 45–46. Thankfully for the petitioner, the court of appeals came to the rescue; it reversed, ruling that the amendments did not prejudice the government and were not designed to delay the proceedings. *Id.* The court also explained that, by denying the amendments responding to the government’s answer and affidavit, the trial court made it impossible for the petitioner to respond to the evidence introduced by the government. *Id.* at 46.

150. *Jenkins*, 2005 WL 769806 at *5.

151. *Id.*

152. One might also argue that, even if the meaningfulness requirement requires appointment before the petition is filed, a petitioner cannot state a violation unless and until she shows that Alabama’s failure to provide counsel in the pre-filing period caused “actual injury” in the form of a lost claim—just as petitioners must do in mounting a meaningful access claim. *See Lewis*, 518 U.S. at 349–51. But such a claim is meritless. With meaningful access, there is no violation unless and until petitioner is unable to get to court with a known claim. *Id.* at 351 (“[M]eaningful access to the courts is the touchstone,” and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.” (quoting *Bounds*, 430 U.S. at 823)). The lost claim, therefore, demonstrates the lack of meaningful access. *See id.* With meaningful counsel, on the other hand, a violation occurs *whenever* the government interferes with the delivery of effective assistance, whether or not the interference results in a lost claim. This is because the right to meaningful capital postconviction counsel is just as much about the *ability to find claims* as it is about actually raising those claims. Thus, if the government voluntarily sets up a counsel system that hinders a petitioner’s ability to discover claims—as is the case with Alabama’s delayed appointment system—then the counsel system is meaningless. Moreover, it hardly makes sense to require a petitioner to produce the very evidence—i.e., the lost claim—that counsel is appointed to uncover in order to state a violation of the right to meaningful capital postconviction counsel. As explained above, because they are in prison, capital petitioners are simply unable to conduct the investigation necessary to fully develop their postconviction petitions. *See supra* nn. 118, 124 and accompanying text. If they were required to produce such evidence, then few, if any, meaningful counsel claims could ever go forward.

from the most critical part of postconviction review, effectively preventing the performance of tasks necessary to protect the petitioner's rights. As a result, capital petitioners are forced to fend for themselves during the pre-filing period, just as they would have to if Alabama had never seen fit to provide a right to counsel in the first place. Without question, Alabama's delayed appointment system renders its grant of counsel unconstitutional.

B. Discretionary Grants of Counsel

Having demonstrated the problems with delayed appointment, there remains only one loose end—the discretionary nature of Alabama's grant of counsel. Under Alabama's current system, even if a petitioner survives summary dismissal, she is not guaranteed appointment of counsel. Instead, counsel will be appointed only if the trial court, in its discretion, determines that "counsel is necessary to assert or protect the rights of the petitioner."¹⁵³

As a threshold matter, one might argue that the discretionary nature of the right to counsel postpones application of the meaningfulness analysis until after counsel is appointed. In other words, if the meaningfulness requirement is triggered once a right is granted, then, in the case of a discretionary right, it is triggered only when the court actually exercises its discretion to grant counsel. Before that point, the argument goes, the petitioner has no right to counsel.¹⁵⁴ This argument fails, however, for it improperly focuses on the court's exercise of discretion rather than on the legislature's decision to provide counsel on a discretionary basis. Once the government decides to provide counsel, due process requires an evaluation of *all terms* under which that right is granted to ensure that the grant provides *effective assistance of counsel*.¹⁵⁵ The discretionary nature of the right, no less than the delayed appointment, is a term that must be evaluated to determine whether Alabama's right to counsel is meaningful. Thus, it is the legislature's decision to provide a discretionary right to counsel, not the exercise of discretion in an individual case, that triggers the meaningfulness requirement.

Not surprisingly, the news is not good for Alabama. As mentioned above, Alabama postconviction courts may appoint counsel if necessary to "assert or protect"

153. Ala. R. Crim. Proc. 32.7(c). Discretionary rights to postconviction counsel are not unusual in non-capital cases. The federal government and numerous states provide discretionary rights on postconviction review. *See e.g.* 18 U.S.C. § 3006A(a)(2)(B) (2000) (discretionary right to counsel in federal habeas cases challenging state or federal convictions); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1, 83–99 (2002) (compilation of counsel provisions for non-capital and capital postconviction proceedings in all fifty states reveals thirty-four states with discretionary right to postconviction counsel in non-capital cases). As explained earlier, *supra* n. 34, this article does not address the constitutionality of discretionary grants of postconviction counsel in non-capital cases. Because of the extreme and final nature of capital punishment, this article focuses only on the constitutionality of discretionary rights to counsel in the capital postconviction context.

154. Under this argument, only petitioners who actually receive court-appointed counsel have a right to meaningful counsel. The problems with delayed appointment would still apply, requiring that the appointment, if it is to take place, must take place before the petition must be filed.

155. *See* McConville, *supra* n. 1, at 97 (arguing "[t]he government cannot limit its obligation [under the meaningfulness requirement] by declaring that its right to counsel contains an effectiveness component measured in pre-performance terms").

the petitioner's rights.¹⁵⁶ Presumably, this means that appointment would be appropriate only in situations where there are rights to protect. The process would be straightforward if the petitioner knows of, and can fully articulate, all alleged violations of her rights. Absent that, however, the court will be hard-pressed to make an accurate determination of whether a given petitioner has any rights to protect.

In addition, Alabama limits its postconviction remedy to claims that were not and could not have been raised at trial or on direct appeal,¹⁵⁷ which generally means claims that are supported by evidence outside the record.¹⁵⁸ Thus, to determine whether a petitioner needs the assistance of counsel, the court would have to examine evidence that is not contained within the existing record. But unless the judge conducts an investigation—which, of course, would require her to shed the role of neutral decision maker and assume the role of advocate¹⁵⁹—she will not have all the information relevant to an accurate determination of the petitioner's need for counsel. Accordingly, in most (if not all) instances, Alabama postconviction courts will have no real information upon which to base their appointment decisions. This creates an intolerable risk that the courts will fail to appoint counsel in cases where petitioners in fact have rights to protect, which in turn renders the right to counsel meaningless. Discretionary appointments might make sense in the context of discretionary direct review, where the court can review the record for possible error,¹⁶⁰ but they do not make sense in the context of postconviction review, where the court depends on the existence of evidence outside the record to evaluate the possibility of error.

A discretionary grant of counsel is also problematic because it appears to assume that capital inmates are differently situated in their ability to protect their rights on postconviction review. But as explained above, this assumption is false. In terms of their ability to protect their rights by investigating, discovering, and properly raising all permissible claims, all capital inmates are similarly situated: they are unable to do so. As

156. Ala. R. Crim Proc. 32.7(c).

157. *Id.* at 32.2(a).

158. See *supra* n. 122 and accompanying text. It is theoretically possible that a postconviction claim could depend upon, and be resolved by, evidence entirely within the record. This might happen, for example, when the trial transcript is not prepared in time for appellate counsel to review it for any record claims before the expiration of time for filing a motion for a new trial. Cf. *Brown*, 903 So. 2d at 164 (transcript of guilty plea unavailable before time for filing motion for new trial expired, so ineffective assistance of trial counsel claim could not have been raised in motion for new trial or on appeal and thus was proper on postconviction). In this situation, the postconviction court could evaluate the need for counsel by examining the record. But whether the courts actually conduct such a review, or instead rely on the *pro se* petitioner's description of the alleged errors, is unknown. If it is the latter, then the postconviction courts are very likely making the appointment determination without sufficient information.

159. See e.g. *Pliler v. Ford*, 542 U.S. 225, 231 (2004) (explaining that judges "have no obligation to act as counsel or paralegal to *pro se* litigants" and that "[r]equiring district courts to advise a *pro se* litigant [of habeas procedure and strategy] would undermine district judges' role as impartial decisionmakers"); Randall L. Hodgkinson, *No-Merit Briefs Undermine the Adversary Process in Criminal Appeals*, 3 J. App. Prac. & Process 55, 56–57 (2001) (noting difference between judge's role and advocate's role); Barbara R. Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. Toledo L. Rev. 1275, 1433 (1984) (noting that trial judges must be careful to stay neutral when monitoring trial counsel's performance).

160. See *Ross*, 417 U.S. at 615 (holding that counsel is not constitutionally required for discretionary appeals during direct review because, *inter alia*, the courts can examine the existing record to determine whether to grant review); cf. *Hammel*, *supra* n. 118, at 395 (arguing that inmates would have an easier time representing themselves during direct review than during postconviction review).

Andrew Hammel so vividly explained: “[n]o death-row inmate will ever be set free from his prison cell to perform the thorough, independent investigation of his case that is a fundamental component of competent habeas representation.”¹⁶¹ It is thus no wonder that thirty-two death penalty states and the federal government have seen fit to provide a *mandatory* right to capital postconviction counsel, while only four states have decided to provide a discretionary right.¹⁶² It is also no wonder that the ABA’s *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* call for mandatory appointment of competent counsel during postconviction review.¹⁶³

In short, it simply is not possible for a court to rationally and reasonably differentiate among capital postconviction petitioners on the basis of need. All will struggle to discover and present their claims in a sufficient manner, and all will need counsel to assist them.

III. CONCLUSION

Like all other jurisdictions that voluntarily provide a right to capital postconviction counsel, Alabama has a constitutional obligation to ensure that the right is meaningful. Unfortunately, Alabama has not lived up to its responsibilities in this regard. Its promise to *consider* appointing counsel after the petition has already been filed is nothing more than a “futile gesture.”¹⁶⁴ As Alabama law proclaims, the purpose of appointing counsel is to assist petitioners in protecting their rights. This can only be accomplished by ensuring that petitioners discover and raise all permissible claims at the proper time and in the proper court. By necessity, counsel’s work must begin well in advance of any filing deadline. Thus, by delaying the appointment decision until after the petition has been filed, Alabama effectively prevents counsel from performing the most important aspects of the job, which undermines the effectiveness guarantee and, hence, the meaningfulness requirement.

The discretionary nature of the right fares no better. A postconviction court cannot be expected to accurately assess the need for counsel in an individual case because it lacks access to information necessary to make that determination—evidence outside the record that supports allegations of error. Unless the petitioner is in possession of such evidence, which is highly doubtful, the court will make the appointment determination without all relevant evidence. This creates an unacceptable risk that petitioners who *have rights to protect*—and who are thus entitled to counsel under state law—will not receive counsel. The consequences are drastic and irrevocable in all cases, but especially in those involving petitioners who are innocent. In the end, Alabama’s system offers nothing more than an empty promise. And under the meaningfulness requirement, this simply is not enough.

161. Hammel, *supra* n. 118, at 395 (internal quotation marks and footnote omitted).

162. See McConville, *supra* n. 1; see also Dripps, *supra* n. 115, at 799 (prisoners’ inability to investigate and develop their claims explains “why, at least in capital cases, counsel typically appears as a matter of court appointment or local rule to represent prisoners in the first round of state collateral attack proceedings.”).

163. ABA, *supra* n. 84, at 930–31.

164. *Evitts*, 469 U.S. at 397; see *Douglas*, 372 U.S. at 358.